Supreme Court, U.S.
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No. 07-978

IN THE
SUPREME COURT OF THE UNITED STATES

FITZROY BARNABY,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition for Writ of Certiorari to the
Appellate Court of Illinois, First District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether finding a person to be a sexual offender for committing an offense that requires no proof of sexual intent and when his acts are found by the trier of facts not to involve sexual motivation is harsh and irrational so as to violate the due process clause, Fourteenth Amendment to the United States Constitution.

PARTIES INVOLVED

Petitioner, Fitzroy Barnaby, was the defendant in the Circuit Court of Cook County, appellant in the Appellate Court of Illinois, First Judicial District, and petitioner in the Supreme Court of Illinois in a Petition for Leave to Appeal.

Respondent, People of the State of Illinois, was the plaintiff in the Circuit Court, appellee in the Appellate Court of Illinois, First Judicial District, and respondent in the Supreme Court of Illinois in a Petition for Leave to Appeal.

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JUDGMENT BELOW

The Order of the Appellate Court of Illinois, First Judicial District, dated June 30, 2005 is attached as Appendix A to this Petition.

The denial of Petition for Leave to Appeal dated September 26, 2007 is attached as Appendix B to this Petition.

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PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

Petitioner, Fitzroy Barnaby, (hereafter, petitioner, or defendant), prays that a Writ of Certiorari issue to review the judgment of the Appellate Court of Illinois, First District, affirming his conviction for unlawful restraint.

JUDGMENT AND OPINION BELOW

The Order of the Appellate Court of Illinois, First District dated June 30, 2005 is set out as App. A.

The Order of the Supreme Court of Illinois denying Petition for Leave to Appeal on September 26, 2007, Case No. 102295 is set out as App. B.

JURISDICTIONAL STATEMENT

Jurisdiction in the Appellate Court of Illinois, First District was based on Illinois Supreme Court Rule 603.

Jurisdiction in the Supreme Court of Illinois was based on Illinois Supreme Court Rule 603 and 615, which provides that appeals from final orders of the Appellate Court of Illinois, First District shall be taken to the Supreme Court of Illinois.

The judgment of the trial court was affirmed on June 30, 2005.

Petition for Leave to Appeal was denied on September 26, 2007.

This Petition for Certiorari is timely filed within 90 days thereafter.

Jurisdiction is invoked under Rules 10(b), 12 and 13 of this Court.

CONSTITUTIONAL PROVISION

The Fourteenth Amendment to the U.S. Constitution provides, in pertinent part:

> "Section 1 ... No State shall ... deprive any person of life, liberty, or property, without due process of law;"

STATEMENT OF THE CASE

Defendant was convicted of unlawful restraint and sentenced to 1 year probation.

730 ILCS 150/2 requires a person to register as a sexual offender when convicted of offenses clearly involving sexual intent or attempt to do so. Such offenses are:

> 11-20.1 (child pornography); 11-6 (indecent solicitation of a child); 11-9.1 (sexual exploitation of a child); 11-15.1 (soliciting for a juvenile prostitute); 11-18.1 (patronizing a juvenile prostitute); 11-17.1 (keeping a place of juvenile prostitution); 11-19.1 (juvenile pimping); 11-19.2 (exploitation of a child); 12-13 (criminal sexual assault); 12-14 (aggravated criminal sexual assault); 12-14.1 (predatory criminal sexual assault of a child); 12-15 (criminal sexual abuse); 12-16 (aggravated criminal sexual abuse); 12-33 (ritualized abuse of a child).

The statute also requires registration of offenses that by their nature do not necessarily involve sexual intent, i.e.:

> (1.5) A violation of any of the following Sections of the Criminal Code of 1961, when the victim is a person under 18 years of age, the defendant is not a parent of the victim, and the

offense was committed on or after January 1, 1996.

10-1 (kidnapping); 10-2 (aggravated kidnapping); 10-3 (unlawful restraint); 10-3.1 (aggravated unlawful restraint).

(1.6) First degree murder under Section 9-1 of the Criminal Code of 1961, when the victim was a person under 18 years of age and the defendant was at least 17 years of age at the time of the commission of the offense.

In this case in it first Order of affirmance, the Appellate Court unanimously held on June 30, 2005 the statute was constitutional and was constitutionally applied. Then on August 17, 2005, the Appellate Court granted a Petition for Rehearing, and on February 1, 2006, withdrew its Rule 23 Order of June 30, 2005. Then on February 16, 2006, the Appellate Court entered an Order that read:

"1. This Court's order of February 1, 2006, withdrawing the Rule 23 Order filed in this case on June 30, 2005, is vacated;

2. This Court's Rule 23 Order filed on June 30, 2005, is reinstated;

> 3. This Court's order of August 17, 2005, granting the defendant's petition for rehearing is vacated; and
>
> 4. The defendant's petition for rehearing is denied."

As to reinstating the June 30, 2005 order, Justice Leslie South, who authored the original Rule 23 affirmance, dissented, stating:

> "I dissent. After hearing oral arguments in this case and reconsideration of the Registration issue, I am of the opinion that the Rule 23 Order which I initially filed as the authoring judge on June 30, 2005, should be withdrawn, and that the order granting the defendant's petition for rehearing should stand. Therefore, I must decline to sign on the instant order."

The Illinois Supreme Court delayed ruling on the Petition for Leave to Appeal in this case and then upheld the statute in People v. Johnson, 225 Ill.2d 573, 870 N.E.2d. 415 (Appendix C) and then denied Petition for Leave to Appeal in this case based on finding the statute constitutional.

These charges related to events that occurred at approximately 7:25 a.m. on Greenwood Road in Cook County.

On November 8, 2002, defendant was driving his car about 7:25 a.m. Miss Beata Wroblewski (Tr. 83) age 14 (Tr. 84), asserted that defendant stopped his car and tried to pull her into his car.

Defendant refuted this, asserting that she carelessly walked in front of his car and he verbally rebuked her, telling her to be more careful.

The trial judge rejected her testimony and found defendant not guilty of attempt kidnapping and child abduction. Defendant was found guilty of unlawful restraint in that he touched her arm.

As to crucial facts of the occurrence, i.e., whether the defendant stated anything to her, and if so, what was occurring when he allegedly stated something, she told different stories to different officers and told different versions in court. She testified defendant said to her, "Come here, little girl." (Tr. 117)

To the first officer (Makowski) she spoke to, she advised that the person said nothing to her. (Tr. 148) He testified:

> "Mr. Cohn: Q: Did the witness tell you, an auto approached from behind her. She heard a honk of the horn from this auto which stopped next to her, and having the right front passenger window open to see the driver who appeared to be the only person in the vehicle.

NOTHING WAS SAID BY THE DRIVER. The auto continued eastbound and turned into a driveway of a townhouse ... When she got to the driveway the auto pulled up and blocked her path. The subject got out and grabbed the upper left arm of the victim. Nothing was said....

Is that what she told you?

A: ... It sounds exactly how I wrote it in my report, so that is what she said, yes.

Q: She never told you that the offender said to her, Come here, little girl, Come here, little girl?

A: At that time, I don't believe so." (Tr. 162-163) (Emphasis added.)

She asserted the officer was wrong as to what she told him.

To Officer Medrys, she advised that the person said, Come here, little girl, after the car stopped. He testified:

"Q: And she told you that the car stopped and pulled in front of her and after the car stopped the person said, Come here, little girl.

Right?

A: Yes.

Q: She did not tell you that the statement, Come here, little girl, was made as the car was traveling, did she?

A: NO. I BELIEVE THAT IT WAS WHEN IT WAS STOPPED." (Tr. 148-149) (Emphasis added.)

In her testimony, she provided different versions. She testified what the person said was "Come here, little girl," as the car was driving past, not when the car was stopped. (Tr. 114)

As to whether Miss Wroblewski was detained, in summary, her testimony is that defendant grabbed her arm and she shook her arm and left. She testified:

"A: I just shook my arm and I ran across the street.

Q: When he grabbed you by the arm were you moved in any way?

A: No.

Q: Did he pull you in any direction?

A: Not -- no.

I don't remember.

Q: What did you do when he had hold of your left arm, your left bicep?

A: I shook my arm." (Tr. 93-94)

She testified:

"Now, when you say that this person got out of the car and grabbed your arm was it for less than a second that he touched your arm?

A: I don't remember.

Q: Was it for five minutes?

A: No.

Q: Was it for a second?

A: No.

Q: Well, how long was it?

A: I don't remember.

It happened so fast.

Q: Now, was this with one hand or with two hands?

A: One hand." (Tr. 113-114)

Nothing was stated when this occurred. (Tr. 142) Defendant only used one hand. (Tr. 113) He did not attempt to use the other arm. (Tr. 113) She testified:

"Q: He touched your arm for a second?

A: Longer.

Q: Two seconds?

A: Three seconds.

Q: Three seconds.

Had he used one hand?

A: Yes.

Q: Did he attempt to use the other hand?

A: No." (Tr. 123) (Emphasis added.)

Additionally, the decision upholding application of this statute to defendant is contrary to the finding of the trial judge on whether defendant's acts involved a sexual element.

The trial court found no sexual activity involved in the crime and stated that he saw no basis for having defendant register as a sexual offender. He stated:

> "And everything I've seen in this trial, I think, I said at the time, and I still think it's more likely than not Mr. Barnaby's intent when he did this was to chastise the girl for her careless pedestrian habit." (Tr.S. 14)
>
> "The overriding factor here in this decision is that there is a presumption of constitutionality of any statute. And I don't believe Mr. Cohn in your argument you've overcome that presumption.
>
> I will state however that I don't really see the purpose of registration in this case. I really don't." (Tr.S. 17)

RAISING THE FEDERAL QUESTION BELOW

This issue was raised in the trial court, on appeal to the Appellate Court of Illinois and the Supreme Court of Illinois.

REASON FOR GRANTING CERTIORARI

1.

Finding a person to be a sexual offender for committing an offense that requires no proof of sexual intent and when his acts are found by the trier of facts not to involve sexual motivation is harsh and irrational so as to violate the due process clause, Fourteenth Amendment to the United States Constitution.

There is no sexual content to the crime, there is no sexual content to the act (touch her arm for 2 or 3 seconds) and the trial judge believed:

> "And everything I've seen in this trial, I think, I said at the time, and I still think it's more likely than not Mr. Barnaby's intent when he did this was to chastise the girl for her careless pedestrian habit." (Tr.S. 14)

> "The overriding factor here in this decision is that there is a presumption of constitutionality of any statute. And I don't believe Mr. Cohn in your argument you've overcome that presumption.
>
> I will state however that I don't really see the purpose of registration in this case. I really don't." (Tr.S. 17)

The Illinois statute was upheld in People v. Johnson, 225 Ill.2d 573, 870 N.E.2d 415. Cases from other States conflict and demonstrate that the Illinois statute as applied to the facts here is unconstitutional.

Under the cases from other State courts, there is good reason to hold the Illinois statute as applied to the facts of this case is unconstitutional.

In Ohio, where the State has a provision similar to the Illinois provision here involved, the court held the statute unconstitutional where the State could not prove the kidnapping or unlawful restraint related to sexual activity. In finding application of the act to defendant to be unconstitutional, the court in Ohio v. Washington, 2001 WL 1415568, stated:

> "The issue of whether a defendant could be adjudicated a sexually orientated offender when the underlying offense was not committed with a sexual motivation was one of first impression in the court. The court acknowledged that the crime, abduction of a person under age 18, falls within the literal terms of the statute. The court noted that some of the other crimes listed in the statute--unlawful restraint, child stealing, and child enticement--also do not invariably have a sexual motivation.

> The legislative intent behind the sexual predator statute was to protect the public from sex offenders by informing the community of their presence, the court observed. This is a legitimate legislative goal, but it is not furthered by notifying the public of the presence of persons convicted of non-sexual crimes, the court reasoned. The court said it could not see how the public is protected from sexual offenders by adjudicating a defendant a sexually oriented offender on the basis of a crime that 'was in no way sexually motivated.' Therefore, the court held that there was no rational relationship between the governmental interest and the imposition of the sexually-oriented-offender label pinned on the defendant." (Id. at p. 4)

That is also true of Illinois law. Here, based on the findings of the trial court, application of the registration statute to defendant is unconstitutional.

A statute, such as the statute at issue here, was held unconstitutional as applied to a kidnapping where there was, as here, no sexual activity involved. Florida v. Robinson, 873 So.2d 1205, Supreme Court of Florida.

There that court held that procedural due process was violated by including him based on

facts of kidnapping in a class of sexual predator. The court held:

> "Designation of individual as sexual predator under Sexual Predators Act constitute deprivation of protected liberty interest on which individual may base claim that his right to substantive due process was violated, where such designation results in stigma as individual is subject to life-long registration requirement and failure to comply with registration requirements constitute third-degree felony. U.S.C.A. Const. Amend. 14; West's F.S.A. Const. Art. 1, § 9; West's F.S.A. § 775.21."

Similar results were reached in People v. Bell, 778 N.Y.S.2d 837. The facts in Bell were set out by the court as follows:

> "On October 23, 1981 the Defendant was convicted of Kidnapping in the first degree, P.I., § 135.25[3], and related crimes. Mr. Bell was sentenced to a term of 20 years to life imprisonment. Briefly, he and two others attempted to rob a man outside of the man's apartment. The robbery was not successful and the intended victim was able to retreat back into his apartment, but in doing so he left his three year old daughter and his friend behind in the hallway. The friend talked his way out of the situation and left; the would-be robbers

took the child and then concocted a scheme to blackmail the victim and his wife. But this effort was foiled as well, the men were arrested, and the child was recovered without harm."

The New York court held the statute as applied to be unconstitutional. The court considered instructive the decision by the court in Ohio. The court stated:

"Earlier this year the Second Appellate District of the Court of Appeals of Ohio, citing *Washington*, agreed, and was more specific: 'Because we conclude that the application of the statutory requirement that Reine be classified as a sexually oriented offender, in a case in which it has been stipulated that his offenses were committed without any sexual motivation or purpose, is unreasonable and arbitrary, and bears no rational relationship to the purposes of the statute, we conclude that it offends the Due Process clauses of both the Ohio and United States constitutions.' "

The court concluded:

"So too here, Mr. Bell's automatic inclusion in the sex offender registry at some level is clearly 'unjust' and 'legally unsound.' None of Mr. Bell's actions in kidnapping the three year old child were done for the purpose of sexual victimization of the child, and there is no

> assertion that during the period in which she was held for ransom the child was in any way molested or sexually abused. Yet, he may be required to take a course and 'admit' to being something he is not. Clearly, to require him to register as a 'sex offender' is completely arbitrary and unreasonable, having no substantial relation to the public morals or general sexually-charged safety issues which the S.O.R.A. was enacted to safeguard against."

Here, as in the above cases, causing defendant to register would serve no purpose and would violate the due process clause of the United States Constitution.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

FREDERICK F. COHN
Attorney for Petitioner

APPENDIX A

THIRD DIVISION
June 30, 2005

No. 1-04-2670

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
v.	)	No. 02 CR 30814
FITZROY BARNABY	)	Honorable Patrick Morse,
Defendant-Appellant.	)	Judge Presiding.

ORDER

Defendant, Fitzroy Barnaby, was indicted by a grand jury for the offenses of attempted kidnaping, child abduction, and unlawful restraint. Subsequent to a bench trial, he was found not guilty of attempted kidnaping and child abduction

but convicted of unlawful restraint. The court sentenced him to a period of one year's probation, a condition of which he was to register as a sex offender. However, the court stayed that registration requirement pending the outcome of this appeal.

The relevant facts are as follows: The 14-year-old female complaining witness testified at trial that on November 8, 2002, she was walking to school on the east side of Ballard Road in Des Plaines, Cook County, Illinois, at approximately 7:25 a.m. when a black BMW blew its horn and drove slowly past her. The passenger's side window was rolled down, and she saw the driver, whom she identified as defendant, look at her and say, "Come here, little girl." However, she ignored him and kept walking. The car then pulled into an alley and made a right turn into an apartment parking lot driveway directly in front of her, blocking her path. At that point, defendant got out of his car, grabbed her by her left arm and "started pulling [her] in" for a few seconds, but she managed to break free of his grasp and run away. He then drove off while yelling something and shaking his head. She described him as having braided hair and wearing gold earrings, black pants and a gray sweater with a stripe emblazoned across the chest.

Shortly thereafter, the complainant met up with two of her friends who were also walking to school and told them what had just happened. She

described her demeanor at that time as being "scared, sweaty, crying." As she and her friends were walking down the street, she saw defendant again, except this time he was driving in the opposite direction. He honked his horn and shook his head at her, and she told her friends that he was the man who had just grabbed her. They ran to a Walgreens store across the street from the school where she purchased a newspaper for her history class. When she arrived at the school a short time later, she saw her social studies teacher and told her what happened. The police were contacted and she spoke to them about the incident.

Four days later on November 12, 2002, she and her mother were being driven to school by Elizabeth Jackson, who is the mother of her best friend, when she saw the same black BMW pull up alongside them. She saw that defendant was driving that car and immediately told her mother that he was the same man who had grabbed her four days earlier.While the two cars were stopped alongside each other, defendant asked Ms. Jackson if she had a problem with him or his car, to which she responded no. When the complainant and her mother got out of the car, defendant drove away. However, they were able to get the license plate number and contacted the police after arriving at the school. Twenty minutes later, the police picked her and her mother up at the school and drove them to a Blockbuster video store parking lot where she identified defendant who had been placed in

handcuffs. She also saw the black BMW parked across the street from the video store.

The complaining witness' two friends with whom she met on the day of the incident testified that she appeared to be very nervous and "shaky." When they asked her what was wrong, she did not say anything at first but eventually told them that a man in a black BMW had pulled up next to her and said, "Come here, little girl," got out of his car and grabbed her by the arm. They further testified that while they were walking down the street, a car drove past them and honked its horn. The complainant cried out that he was the same man who had just grabbed her, and that they better run "before [he] gets you." They ran to a Walgreens store and then to school, and at that time, according to the witnesses, the complainant was still shaking and crying.

Anna Zajac, the victim's social studies teacher, testified that on November 8, 2002, she was doing "door duty" at the school when the complainant and her two friends entered. The complainant, who was crying and appeared frightened, said that she needed to go to the office and see somebody. Ms. Zajac left her with the principal, and that was the end of her involvement in the matter.

Elizabeth Jackson, the woman who drove the van on November 12, 2002, testified that when she pulled into an intersection, the complainant, who

was a passenger along with her mother, began screaming and crying and said, "Oh, my gosh, this is the car, this is the black BMW." At that time, Ms. Jackson saw a four-door black BMW being driven by defendant, whom she identified in open court. She wrote down the license plate number and drove away, but the black BMW followed her and then pulled directly in front of her, blocking her path, It then turned around and pulled up next to her. The driver, whom she identified as defendant, rolled down his window and asked her if she had a problem with him or his car, and she said no, she did not. He appeared to be upset and drove off at a high rate of speed. She contacted the police and gave them the license plate number.

Officer Albert Makowski, the reporting officer who initially interviewed the complaining witness at her school on November 8, 2002, testified, over a hearsay objection by defense counsel, that she told him that defendant, who was wearing a black sweater with a horizontal white stripe across the chest, blocked her path with his car, got out and grabbed her by the upper left arm, but she managed to break away from his grip. She never told him that the offender said, "Come here, little girl." In fact, his report indicated that "nothing was said."

Officer Medrys, a detective with the Cook County Sheriff's Police Department, testified that he interviewed the complainant by telephone on

November 8, 2002. Over defense counsel's same objection, Medrys testified that the complaining witness told him that the offender stopped his car in front of her and said, "Come here, little girl" two times before getting out. On November 12, 2002, he received information that an offender had been apprehended regarding this incident. He went to his headquarters in Maywood and spoke with defendant in an interview room. After reading him his Miranda rights, he advised him of the allegation against him and asked him if he was involved in an incident on Ballard Road in Des Plaines, Illinois with a white female who was approximately 14 years old. At first defendant denied being anywhere near that area, but when advised that his vehicle had been positively identified by its license plate number, he admitted to being on Ballard Road and swerving around a white female who was walking in the roadway. He described her as being around 10 or 12 years of age, blond hair and wearing a backpack. Officer Medrys further testified that he asked defendant if he said anything to this girl, to which defendant replied, "Like what? Come here little girl?" However, he denied saying anything to her. After Officer Medrys told him that he found it difficult to believe that he did not say anything after almost hitting her, defendant admitted that he did say, "Watch out, what are you doing, are you crazy," or words to that effect. He also denied turning his car around in a parking lot and cutting off the complaining witness' path and getting out of his car. He stated that he

wore hair in cornrows or braids that day but took them out the next day, and that he was wearing black pants and a brown shirt on the date of the incident. Officer Medrys further testified that a search of the vehicle revealed a black sweater with a white horizontal stripe.

Defendant testified that on November 8, 2002, after having dropped his girlfriend off at her place of employment, he was driving down the street when the complaining witness walked in front of his car, causing him to swerve to avoid hitting her. He stopped his car, rolled down the window, and said, "Little girl, are you crazy or stupid?" He denied getting out of his car or grabbing her or saying, "Come here, little girl." He further testified that a few days later while he was driving the same black BMW, he pulled up to a stoplight, and a van pulled up next to him. A woman inside the van was looking into his car and appeared to be writing something down on a piece of paper. When the van drove off, he followed it and pulled up alongside it. He rolled down his window and blew his horn to get the woman's attention and asked her if there was a problem with either him or his car, but she said no. He then turned around and drove away. Shortly afterwards, he was pulled over by the police and arrested and taken to the Maywood police station where he was interviewed by police officers. During that interview, he told the police that he never got out of his car or touched the girl or said, "Come here, little girl."

At the conclusion of the trial, the court acquitted defendant on the attempted kidnaping and child abduction charges but convicted him on the unlawful restraint charge, stating:

> "I do believe that Mr. Barnaby did grab the girl's arm. It was certainly at that point that he restrained her. I do believe that all the elements of unlawful restraint were met, however, briefly, by that grabbing; and the State has established each and every element of that offense beyond a reasonable doubt. To the extent that Mr. Fitzroy Barnaby's testimony is to the contrary, I find it not worthy of belief "

The court sentenced defendant to one year's probation and ordered him to be registered as a sex offender in conformance with section 2(B) of the Sex Offender Registration Act (730 ILCS 150/2(B) (West 2002). However, defense counsel objected on the grounds that there was no evidence that the offense was sexual in nature, and that the Registration Act was, therefore, unconstitutional as applied.

In discussing the registration requirement, the court stated:

> "And in this case the State has argued that there was some nefarious motive on the part of

> Mr. Barnaby in the unlawful restraint that he committed upon the young victim. And that may be true. I can't read his mind. *** And everything I've seen in this trial, I think, I said at the time, and I still think it's more likely than not Mr. Barnaby's intent when he did this was to chastise the girl for her careless pedestrian habit. I don't know that to be true for a fact. As I said I can't read his mind or his heart. I think that's probably what it was. The State's entitled to their opinion as to what they think he was doing, but I don't think there is sufficient proof in this record to back up that position. And that's my read on it. *** I will state however that I don't really see the purpose of registration in this case. I really don't. But I feel that I am constrained by the statute. I have to follow the law in this case. So I'm going to order the period of registration *** [but] I will stay the registration requirement during the pendency of the appeal ***."

Defendant has raised the following issues for our review: (1) whether the evidence is sufficient to find him guilty beyond a reasonable doubt; (2) whether the evidence proved unlawful restraint; and (3) whether 730 ILCS 150/2(B) is unconstitutional in violation of the due process clause of the Illinois Constitution and the due process clause of the Fourteenth Amendment of the United States Constitution in that such classification is irrational.

Initially, defendant argues that the evidence was insufficient to prove his guilt beyond a reasonable doubt because the complainant's testimony was contradictory. Specifically, he points to the evidence that the complaining witness never told Officer Makowski, the first officer who interviewed her at the school on the day of the incident, that defendant said, "Come here, little girl," but she told Officer Medrys later on that he said those words as he drove past her. Defendant maintains that these contradictions raise a reasonable doubt as to his guilt.

Prior to making its ruling, the trial court assessed the credibility of the complaining witness and defendant as follows:

> "First of all, I don't believe that [the complainant] in this case gave me an entirely accurate version of what occurred on that date nor do I believe that Mr. Barnaby was entirely candid when he testified here today nor was he entirely candid when he talked to the detective when he gave his statement. *** The issue about the statement of come here, little girl, I disagree with the State entirely as to their assertion that she was unimpeached, and that was clear, and that that was said.
>
> I don't believe the evidence in this case establishes beyond a reasonable doubt that the

> defendant ever said that. I don't believe, and the reason I don't is, you look at what [the complainant] said [to] the first [police officer] - Officer Makowski. She said the defendant said nothing. That's not an impeachment by omission. That's a completely, contradictory, different statement.
>
> [A]nd it's only when she has an opportunity to talk to [the second officer] later on that the concept of come here, little girl statement first appears. *** I do believe that the defendant's version of being near a traffic accident probably happened. *** I don't believe the defendant when he says he didn't touch her. * ** And there is no doubt here at all that this defendant had contact with [the complainant]. The description given by the young girl of this defendant would not be possible if he had merely stayed in his car. I think he got out of the car, and I think he grabbed her arm."

The standard of review on a challenge to the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. People v. Cooper, 194 Ill. 2d 419, 430-31, 743 N.E.2d 32 (2000). The determination of the credibility of the witnesses, the weight given their testimony, and the inferences drawn therefrom are exclusively within the province of the

trier of fact, and a reviewing court will not overturn the trial court's determination merely because the reviewing court would have decided the case differently. People v. Holmes, 198 Ill. App. 3d 766, 777, 556 N.E.2d 539 (1989). The testimony of a single witness, if it is positive and the witness credible, is sufficient to convict even though it is contradicted by the accused. People v. Anderson, 325 Ill. App. 3d 624, 634 (2001). We will not reverse a conviction unless the evidence is so improbable or unsatisfactory as to raise a reasonable doubt of defendant's guilt. People v. Williams, 165 Ill. 2d 51, 54-55, 649 N.E.2d 397 (1995).

Defendant contends that the testimony of the complaining witness, who was the single occurrence witness, was neither positive nor credible because of the contradictions. While it is clear from the court's comments that it believed some portions of the complainant's testimony and not others, it is also clear that it believed some portions of defendant's testimony and not others. It is interesting to note that according to Officer Makowski, when defendant was asked if he said anything to the complainant, his response was, "Like what? Come here, little girl?" At that point in time, Officer Makowski had not told defendant that the complainant had stated that he said those words to her. The trial court did not refer to that evidence in his summary of the evidence, which we believe to be rather significant. However, be that as it may, the crucial question is not whether the

State proved beyond a reasonable doubt that defendant uttered those words but whether or not the evidence established beyond a reasonable doubt that he got out of his car and grabbed the complainant by her arm. The court noted, as do we, that it is very unlikely the complainant could have given such an accurate description of defendant's clothing unless he actually got out of his car, which he denies he ever did. What is clear is that the complainant was consistent throughout her testimony that defendant got out of his car and grabbed her by the left arm. Furthermore, her testimony is corroborated by the immediate outcry witnesses who testified that she was obviously distraught and said that a man had grabbed her. On that critical point, she was never impeached. For these reasons, we find that the evidence was not so improbable or unsatisfactory as to raise a reasonable doubt of defendant's guilt.

Next, defendant argues that the evidence failed to prove that he unlawfully restrained the complaining witness because the grabbing of the arm lasted only a few seconds, and her freedom of movement was never impaired. He contends that while that evidence may prove a battery, it does not prove unlawful restraint.

A person commits the offense of unlawful restraint when he knowingly without legal authority detains another. 720 ILCS 5/10-3 (West 2004). The gist of unlawful restraint is the

detention of a person by some conduct which prevents him from moving from one place to another. People v. Brials, 315 III. App. 3d 162 (2000). If a party is actually restrained without legal authority, the duration of the restraint, however short, is inconsequential. People v. Jones, 93 Ill. App. 3d 475 (1981).

According to the evidence, defendant pulled his car in front of the complainant, blocking her path and preventing her from walking any further and impairing her locomotion. While she was stopped, however briefly, defendant got out of his car and grabbed her by the arm without her consent, thereby preventing her movement for at least another few seconds. Even though defendant did not force the complainant into his car or harm her in any way, and even though the detention was only for a few seconds, that brief duration was sufficient to satisfy the elements of unlawful restraint beyond a reasonable doubt. Actual or physical force is not a necessary element of unlawful restraint as long as an individual's freedom of locomotion is impaired. People v. Bowen, 241 III. App. 3d 608, 627-28, 609 N.E.2d 346 (1993). In this case, we do have some degree of physical force.

Lastly, defendant argues that section 2(B)(1.5)(730 ILCS 150/2(B)(1.5) (West 2004))as it defines sex offenses as unlawful restraint when the victim is under the age of 18 and the defendant is

not a parent and is over the age of 18 is unconstitutional. Specifically, defendant argues that since the trial court did not find that defendant's actions involved sexual activity, requiring him to register as a sex offender is irrational and violates his rights to due process.

The Registration Act requires any convicted sex offender to register with the chief of police of the municipality or county where he or she resides for more than 10 days. 730 ILCS 150/3(a) (West 2004). The offender must provide his date of birth and update any changes in his home address, work address and employer for either 10 years or the rest of his or her natural life. 730 ILCS 150/6 through 8-5 (West 2004).

The Registration Act provides in part:

"Duty to register.

(a) A sex offender shall *** register in person:

(1) with the chief of police of the municipality in which he or she resides or is temporarily domiciled for more than 30 days ***.

(A) Sex offender means any person who is:

(1) charged pursuant to Illinois law, or any

> substantially similar federal, sister state, or foreign country law, with a sex offense set forth in subsection (B) of this Section or the attempt to commit an included sex offense, and:
>
> (B) As used in this Section, 'sex offense' means: *** Unlawful restraint." 730 ILCS 150/3; 730 ILCS 150/2 (West 2004).

As this issue presents a question of law, statutory construction and constitutional validity, our standard of review is *de novo.* People v. Malchow, 193 Ill. 2d 413, 418 N.E.2d 433, 437 (2000). The Registration Act was enacted by the Illinois legislature to create an additional method of protection for children from the increasing incidence of sexual assault and sexual abuse (84th Ill. Gen. Assem., House Proceedings, June 23, 1986, at 208). "It was designed to aid law enforcement agencies * * * by making the habitual offender's address readily available to law enforcement agencies." People v. Adams, 144 Ill. 2d 381, 387, 581 N.E.2d 637, 640 (1991).

This court has previously addressed this issue. In People v. Fuller, 324 Ill. App. 3d 728, 756 N.E.2d 255 (2001), defendant was convicted of aggravated kidnaping after stealing a van which contained two children. Defendant never touched the children, and when they escaped from the van, he did not attempt to stop them. As in this case, the defendant in Fuller argued that there was no rational

relationship between the offense of which he was charged and the legislative intent of the Registration Act. Fuller, 324 Ill. App. 3d at 731. In undertaking a due process analysis, the court first determined that the Registration Act did not affect a fundamental constitutional right, thereby necessitating the application of the rational basis test to determine whether it violates due process. Fuller, 324 Ill. App. 3d at 732. Under the rational basis test, a statute is presumed to be valid, and the party challenging the statute has the burden of proving that the statute is irrational. In other words, as long as there is a conceivable basis for finding a rational relationship, the law will be upheld. The court in Fuller determined that the public interest was served by the Registration Act based upon the legislative intent and determined that there was a rational relationship between the statute and the interest served. As defendant in the instant case, the Fuller defendant argued that it was unfair for him to suffer the stigmatization of being labeled a sex offender when his crime was not sexually motivated. The Fuller court stated that the most obvious connection between the offense listed and the purpose of the Registration Act is that unlawful restraint of a minor is often a precursor offense to juvenile pimping or exploitation of a child, which is indisputably within the purview of the Registration Act's purpose. In conducting the three-step analysis, the Fuller court found: (1) the Registration Act bears a reasonable relationship to the public interest intended to be

protected, and the means adopted is a reasonable method of accomplishing the desired objective; (2) there is a rational relationship between the statute and the interest served; and (3) the method used by the Registration Act is reasonable.

We find the reasoning in Fuller to be persuasive. We acknowledge that defendant did not commit an offense which is generally labeled sexually oriented, such as rape, sexual assault or pimping, but the Registration Act clearly identifies unlawful restraint of a person under 18 as a "sex offense." As the Fuller court pointed out, unlawful restraint of a minor is often a precursor offense to exploitation of a child or juvenile pimping, which are within the purview of the Registration Act's purpose. In the instant case, while the trial court did make note of the fact that there did not appear to be any sexual elements to this offense, it did state repeatedly that it did not know what was on defendant's mind, even though it believed that he was simply trying to "chastise the girl for her careless pedestrian habit. Yet again, the court stated that it did not know that to be true for a face since it could not read defendant's "mind or his heart." Nevertheless, while traffic altercations and road rage occur on a daily basis, it is rare for a driver to get out of his car and grab a pedestrian, particularly when its an adult male and a 14-year-old little girl. Clearly, this is precisely the type of situation the Registration Act addresses since grabbing young girls on city streets could be a

precursor to child abduction or rape. We do not doubt that the term "sex offender" carries a stigma. However, it is defendant's actions which have caused him to be stigmatized, not the courts. We find, therefore, there is a rational relationship between unlawful restraint of a minor under 18 and the purpose of protecting children from the increasing incidence of sexual assault and sexual abuse, and that the Registration Act is not unconstitutional as applied in the instant case.

Accordingly, based upon the foregoing analysis, the judgment of the circuit court is affirmed.

Affirmed.

SOUTH, J., with KARNEZIS, P.J., and HOFFMAN, J., concurring.

APPENDIX B

No. 102295

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

September 26, 2007

Mr. Frederick F. Cohn
Attorney at Law
35 East Wacker Drive
Suite 1525
Chicago, IL 60601

No. 102295 - People State of Illinois,
respondent, v. Fitzroy Barnaby,
petitioner. Leave to appeal,
Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

Burke, J., took no part.

The mandate of this Court will issue to the Appellate Court on November 1, 2007.

APPENDIX C

Docket No. 102096.

IN THE
SUPREME COURT
OF
THE STATE OF ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,
Appellant, v. CHARLES JOHNSON, Appellee.

Opinion filed May 24, 2007.

JUSTICE FITZGERALD delivered the judgment of the court, with opinion.

Chief Justice Thomas and Justices Garman and Karmeier concurred in the judgment and opinion.

Justice Burke dissented, with opinion, joined by Justices Freeman and Kilbride.

OPINION

The central issue in this case is whether the Sex Offender Registration Act (730 ILCS 150/1 *et seq.* (West 2000)) violates due process because it required the defendant, Charles Johnson, to register as a sex offender after he was convicted, in

the circuit court of Cook County, of aggravated kidnapping of a minor. See 720 ILCS 5/10-2 (West 2000). The State appeals the decision of the appellate court that the Act was unconstitutional as applied to the defendant. 363 Ill. App. 3d 356. For the reasons that follow, we reverse and remand.

BACKGROUND

In 1986, the General Assembly enacted the Habitual Child Sex Offender Registration Act, which required persons convicted of sex offenses against children to register with local law enforcement. Ill. Rev. Stat. 1987, ch. 38, par. 221 *et seq.* In 1996, the statute was renamed the Sex Offender Registration Act and expanded to include certain sex offenses against adults, as well as nonsexual offenses against children. See 730 ILCS 150/1 *et seq.* (West 1996). Section 2(A)(1)(a) of the Act defined "sex offender" as a person charged with and convicted of an enumerated sex offense. 730 ILCS 150/2(A) (1)(a) (West 2002). Section 2(B)(1.5) of the Act included, in its definition of "sex offense," aggravated kidnapping "when the victim is a person under 18 years of age, the defendant is not a parent of the victim, and the offense was committed on or after January 1, 1996." 730 ILCS 150/2(B)(1.5) (West 2002). A person convicted of a sex offense must register as a sex offender with local law enforcement. See 730 ILCS 150/3 (West 2002).

On October 23, 1999, the defendant and four accomplices kidnapped Elmora Kimbrough and her 20-month-old granddaughter and demanded a ransom from Kimbrough's son. Two of the accomplices were arrested when they attempted to collect the ransom, and they led the police to a van where the victims and the defendant were found The defendant was arrested and later indicted on one count of armed robbery, one count of armed violence, one count of possession of a stolen motor vehicle, one count of aggravated battery, nine counts of aggravated kidnapping, and three counts of unlawful use of a weapon.

On December 14, 2001, the defendant entered open guilty pleas to the armed robbery of Kimbrough and the aggravated kidnapping of her granddaughter, and the State dismissed the remaining counts against him. The trial court found a factual basis for the guilty pleas, and the defendant became subject to the registration requirements of the Act as a person charged with and convicted of aggravated kidnapping of a minor by a nonparent. At the sentencing hearing, the trial court reviewed the facts of this case and noted that Kimbrough had been undressed and bound during the kidnapping in order to control her, but that there were no sexual assault allegations. On January 29, 2002, the defendant was sentenced to concurrent terms of 17 years' imprisonment for each offense. He appealed.

The appellate court determined that the defendant received negotiated plea admonishments under Supreme Court Rule 605(c), rather than open plea admonishments under Rule 605(b) (see 210 Ill. 2d R. 605(b)), and remanded for compliance with that rule. *People v. Johnson,* No. 1-02-2531 (2003) (unpublished order under Supreme Court Rule 23). On remand, the trial court admonished the defendant in accordance with Rule 605(b) and denied the defendant's *pro se* "motion to correct a void sentence" and "motion requesting reconsideration and reduction of sentence." In its ruling the court repeated that there were no sexual assault allegations: Kimbrough "was held, and at one time all her clothes were taken off * * *, I guess as part of controlling her they made her take all her clothes off." The defendant appealed, raising for the first time the constitutionality of the Act.

The appellate court determined that defense counsel failed to file a certificate under Supreme Court Rule 604(d) (see 210 Ill. 2d R. 604(d)), and again remanded for compliance with that rule. 363 Ill. App. 3d at 360. The appellate court further held that the Act, as applied to the defendant, violated the due process clauses of the federal and state constitutions. 363 Ill. App. 3d at 363-64. The appellate court found, "The record indicates that defendant's offense of aggravated kidnaping was not sexually motivated." 363 Ill. App. 3d at 363. Consequently, concluded the court, there was no

rational relationship between the defendant's designation as a sex offender and the state's interest in protecting the public. 363 Ill. App. 3d at 363.

Justice Wolfson concurred with the majority's decision to remand the cause for a Rule 604(d) certificate, but he dissented on the constitutional issue. 363 Ill. App. 3d at 364 (Wolfson, J., specially concurring in part and dissenting in part). According to Justice Wolfson,

> "It is the nature of the crime-kidnaping a child-that triggers the Registration Act provisions.
> * * *
>
> *** Once an offender makes the decision to commit the aggravated kidnaping of a child, there is a very real possibility the child will become a victim of sexual abuse. Our Reports are filled with such cases.
>
> In this case the crime was interrupted while it was in progress. The child was being held in a stolen van when the police arrived. The legislature has the authority to protect children from such an offender. Requiring him to register his name and address with law enforcement officials does not offend due process of law." 363 Ill. App. 3d at 364-65 (Wolfson, J., specially concurring in part and dissenting in part).

ANALYSIS

After we allowed the State's petition for leave to appeal, Public Act 94-945 was adopted. Effective June 27, 2006, Public Act 94-945 amended section 2(B)(1. 5) and redefined the term "sex offense" under the Act. Section 2(B)(1.5) of the Act now includes, in its definition of sex offense, aggravated kidnapping "when the victim is a person under 18 years of age, the defendant is not a parent of the victim, *the offense was sexually motivated as defined in Section 10 of the Sex Offender Management Board Act,* and the offense was committed on or after January 1, 1996." (Emphasis added.) Pub. Act 94-945, §1025, eff. June 27, 2006 (amending 730 ILCS 150/2(B)(1.5)).

Public Act 94-945 also contained the Child Murderer and Violent Offender Against Youth Registration Act. See Pub. Act 94-945, eff. June 27, 2006 (adding 730 ILCS 154/1 *et seq.).* A person convicted of, *inter alia,* aggravated kidnapping of a minor by a nonparent must now register under the Sex Offender Registration Act when the offense is sexually motivated, and under the Violent Offender Against Youth Registration Act when it is not. Section 11 of this Act provides for transfers from one registry to the other:

> "(a) The registration information for a person registered under the Sex Offender

Registration Act who was convicted or adjudicated for an offense listed in subsection (b) of Section 5 of this Act may only be transferred to the Child Murderer and Violent Offender Against Youth Registry if all the following conditions are met:

(1) The offender's sole offense requiring registration was a conviction or adjudication for an offense or offenses listed in subsection (b) of Section 5 of this Act.

(2) The State's Attorney's Office in the county in which the offender was convicted has verified, on a form prescribed by the Illinois State Police, that the person's crime that required or requires registration was not sexually motivated as defined in Section 10 of the Sex Offender Management Board Act.

(3) The completed form has been received by the registering law enforcement agency and the Illinois State Police's Sex Offender Registration Unit." Pub. Act 94-945, eff. June 27, 2006 (adding 730 ILCS 154/11(a)).

Though we have held that the Sex Offender Registration Act applies retroactively (see *People* v. *Malchow,* 193 Ill. 2d 413, 418 (2000)), we have not held that the amendments to that statute in Public Act 94-945 do so. Generally, a statutory amendment cannot be given retroactive effect

absent a clear expression of legislative intent. See *In re Detention of Lieberman,* 201 Ill. 2d 300, 321 n.3 (2002); see also *People* v. *Atkins,* 217 Ill. 2d 66, 71 (2005) (intimating that a statutory amendment may be applied retroactively where the legislature so intends). Here, amended section 2(B)(1.5), like original section 2(B)(1.5), applies to persons convicted of aggravated kidnapping of a minor after January 1, 1996. This obviously includes the defendant. Under the original statute, aggravated kidnapping of a minor was defined as a sex offense, regardless of its motivation. As Justice Wolfson noted in his dissent, the nature of the crime itself triggered the registration requirement. See 363 Ill. App. 3d at 364 (Wolfson, J., specially concurring in part and dissenting in part). Under the amended statute, this offense is defined as a sex offense only if it is sexually motivated. Now, the nature of the crime coupled with its impetus triggers the registration requirement.

Generally, "where a challenged statute is amended while the cause is pending, the question of the statute's validity becomes moot, thus rendering unnecessary its review by the court." *People* v. *B.D.A.,* 102 Ill. 2d 229, 233 (1984). Concluding that amended section 2(B)(1.5) applies retroactively, however, does not take the defendant off the sex offender registry. Indeed, the parties agree on retroactivity, but they vigorously contest the constitutionality of original section 2(B)(1.5). Though Representative Fritchey, one of the House

sponsors of Public Act 94-945, asserted that the statute "simply shifts" a person from the sex offender registry to the violent offender against youth registry if the offense was not sexually motivated (see 94th Ill. Gen. Assem., House Proceedings, February 22, 2006, at 13 (statements of Representative Fritchey)), the Act is not self-executing. It does not provide for a fresh judicial determination of whether an offense that placed a person on the sex offender registry before June 27, 2006, was sexually motivated.[1] The defendant's only recourse is the transfer provision of section 11 of the Violent Offender Against Youth Registration Act. The mechanics of this provision are, at best, ill-defined.

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[1]Contrary to the State's suggestion in its reply brief, section 86 of the Violent Offender Against Youth Registration Act provides no relief to the defendant. Section 86 states, "Any person who is convicted of any of the offenses listed in subsection (b) of Section 5 of this Act on or after [June 27, 2006], shall be required to register as an offender on the Child Murderer and Violent Offender Against Youth Registry if, at the time of sentencing, the sentencing court verifies in writing that the offense was not sexually motivated ***." Pub. Act 94-945, eff. June 27, 2006 (adding 730 ILCS 154/86). The defendant was sentenced on January 29, 2002, more than four years before Public Act 94-945 became effective. At that time the trial court did not verify in writing or otherwise that the offense against Kimbrough's granddaughter was not sexually motivated.

Unlike the Sexually Dangerous Persons Act (see 725 ILCS 205/9 (West 2004))and the Sexually Violent Persons Commitment Act (see 725 ILCS 207/65 (West 2004)) which expressly allow committed persons to file discharge petitions, section 11 does not provide that a registered person may file a transfer petition. Additionally, section 11 does not instruct the trial court to decide whether the offense was sexually motivated. The statute leaves that decision solely to the discretion of the State's Attorney: a transfer is conditioned, in part, on whether the State's Attorney in the county where the person was convicted has verified that there are no facts underlying the offense indicating sexual conduct or an intent to engage in such conduct. Pub. Act 94-945, eff June 27, 2006 (adding 730 ILCS 154/11), citing 20 ILCS 4026/10 (West 2004). Section 11 further does not contemplate judicial review of a decision by the State's Attorney that the offense was sexually motivated, and

---

[Footnote 1 continued:]

The State's position at oral arguments that this cause is "going back for resentencing" is incorrect. This cause is being remanded only for a Rule 604(d) certificate, not for resentencing. Because his sentence has been entered, the defendant remains convicted (see *People* v. *Woods*, 193 Ill. 2d 483, 487 (2000), citing *People* v. *Robinson*, 89 Ill. 2d 469 (1982)) and thus outside section 86. If, in the future, the defendant's present sentence is vacated, and he is truly subject to resentencing, then section 86 would apply.

consequently that the person is ineligible for a transfer. The case before us exemplifies the problem with the statutory scheme.

When the defendant was convicted, section 2(B)(1. 5)' s definition of sex offense did not hinge on motivation, and the trial court understandably made no express finding in that regard. The trial court twice referred to the fact that Kimbrough had been undressed before she was bound. At the defendant's first sentencing hearing, the court observed that there were no sexual assault allegations accompanying this conduct. Later, on remand at a hearing for Rule 605(c) admonishments, the trial court guessed that this conduct was a means to control Kimbrough. The gratuitous and equivocal nature of the trial court's comments on this issue undermine the appellate court's confident announcement that the record indicates the defendant's offense was not sexually motivated. See 363 Ill. App. 3d at 363. More importantly, the trial court's comments concerned the defendant's conduct toward Kimbrough, not his conduct toward her granddaughter. It remains inappropriate for a reviewing court to make fact determinations, and it is particularly inappropriate on this record. We vacate the appellate court's conclusion on this issue.

Before us, the State still insists that the defendant's conduct was sexually motivated. In its opening brief the State asserts that the statutory

definition of sexually motivated "is a very low threshold." The State continues:

> "The removal of all of a victim's clothing is not inherently part of the detention or captivity of kidnaping victims, nor is it related to effectuating a ransom. It is, however, circumstantial evidence of an intent to commit a sexual assault. [Citations.]
>
> Here, the notion that five adult males had to remove all of the clothes of the 60 year old woman as a measure of control during the kidnaping of her and her young granddaughter ignores the fact that she was both bound and isolated in a vehicle the offenders chose for the very purpose of the captivity and further ignores that the ransom attempt was interrupted by the police rescue. Stripping a victim naked is not an inherent part of the captivity or concealment of kidnaping; it may not reach the level of a chargeable sex offense but *it demonstrates an intent towards sexual assault which certainly exposed the child to sexual exploitation.*
>
> * * * Given the totality of the circumstances, and the low threshold necessary to trigger the [Act], *this case demonstrates a sexual intent sufficient to show that the child was at high risk of sexual exploitation."* (Emphases added.)

The message is unmistakable to the defendant. In his response brief the defendant correctly acknowledges that "transfer to the new registry is not automatic" because section 11 allows a transfer only after the State's Attorney has verified the offense was not sexually motivated. Thus, the defendant states, even if this court were to remand this cause to the trial court for transfer proceedings-proceedings for which section 11 does not specifically provide-"the State has made it emphatically clear that it is unwilling to transfer him to the new *** registry." Considering the vehemence of the State's argument here, it would be speculative to conclude that on remand the State would simply shift the defendant's registration information from the sex offender registry to the violent offender against youth registry.

We must apply Public Act 94-945 as it is written; we may not rewrite that law to make it consistent with our ideas of orderliness and public policy. See *Henrich v. Libertyville High School,* 186 Ill. 2d 381, 394-95 (1998). Section 11 clearly does not require the State to raise the possibility of a transfer, and it does not require the trial court to raise that possibility *sua sponte.* If it is the defendant's prerogative to advance this argument, the statute provides no means for him to do so. Thus, the defendant remains on the sex offender registry because Public Act 94-945 offers him no way off of it. The constitutionality of original

section 2(B)(1.5), under which the defendant was placed on the sex offender registry, is squarely before us. We turn to that statute.

All statutes carry a strong presumption of constitutionality. *People v. Botruff,* 212 Ill. 2d 166, 178 (2004). To overcome this presumption, a party challenging a statute must clearly establish that it violates the constitution. *People v. Dinelli,* 217 Ill. 2d 387, 397 (2005). This court will affirm a statute's constitutionality if the statute is reasonably capable of such an interpretation. See *People v. Einoder,* 209 Ill. 2d 443, 450 (2004). The question of whether a statute is unconstitutional is a question of law, and our review is *de novo. People* v. *Malchow,* 193 Ill. 2d 413, 418 (2000).

"Under substantive due process ***, a statute is unconstitutional if it impermissibly restricts a person's life, liberty or property interest." *People* v. *R. G.,* 131 Ill. 2d 328, 342 (1989); see also *Reno* v. *Flores,* 507 U.S. 292, 301-02, 123 L. Ed. 2d 1, 16, 113 S. Ct. 1439, 1447 (1993). Where, as here, the challenged statute does not affect a fundamental right, the so-called rational basis test applies. See *Davis* v. *Brown,* 221 Ill. 2d 435, 450 (2006).[2] Under the rational basis test, our inquiry is twofold: we

[2]The defendant does not contend that the Act affects a fundamental right, and we have not held otherwise. See *In re J. W.,* 204 Ill. 2d 50, 67 (2003).

must determine whether there is a legitimate state interest behind the legislation, and if so, whether there is a reasonable relationship between that interest and the means the legislature has chosen to pursue it. See *People* v. *Reed,* 148 Ill. 2d 1, 11 (1992), citing *People* v. *Lindner,* 127 Ill. 2d 174, 180 (1989); *Jacobson* v. *Department of Public Aid,* 171 Ill. 2d 314, 323 (1996) (the rational basis test asks "whether the method or means employed in the statute to achieve the stated goal or purpose of the legislation is rationally related to that goal"); *People* v. *Adams,* 144 Ill. 2d 381, 390 (1991) (the statute must bear "a reasonable relationship to a public interest to be served, and the means adopted are a reasonable method of accomplishing the desired objective"). The rational basis test is highly deferential; its focus is not on the wisdom of the statute. *Village of Lake Villa* v. *Stokovich,* 211 Ill. 2d 106, 125 (2004). If there is any conceivable set of facts to show a rational basis for the statute, it will be upheld. *People ex rel. Lumpkin* v. *Cassidy,* 184 Ill. 2d 117, 124 (1998); see *Arangold Corp.* v. *Zehnder,* 204 Ill. 2d 142, 147 (2003) ("The judgments made by the legislature in crafting a statute are not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data").

The purpose of the Act is to aid law enforcement by facilitating ready access to information about sex offenders and, therefore, to protect the public. See *People* v. *Cornelius,* 213 Ill.

2d 178, 205 (2004) ("the primary purpose of the Registration Act *** is to assist law enforcement and to protect the public"); *Adams,* 144 Ill. 2d at 390 ("the public interest to be served by the Registration Act is the assistance to law enforcement in the protection of children"); *People* v. *Marsh,* 329 Ill. App. 3d 639, 644 (2002)[3] This is obviously a legitimate state interest. See *People* v. *Huddleston,* 212 Ill. 2d 107, 133 (2004). Our focus shifts to the nexus between this interest and the statute, as applied to the defendant. That is, we ask whether it was reasonable to require the defendant, a nonparent convicted of aggravated kidnapping of a minor, to register under the Act, regardless of whether this offense was sexually motivated.

The State argues that the legislature had a rational basis to label aggravated kidnapping of a minor by a nonparent a sex offense and, consequently, the defendant a sex offender. The State contends that, in adding abduction offenses

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[3]The State argues that the appellate court misunderstood the purpose of the Act. The appellate court initially stated that the purpose of the Act is "providing the public with information regarding the whereabouts of convicted sex offenders" (363 Ill. App. 3d at 363), but later mentioned "the State's interest in protecting the public from convicted sex offenders" (363 Ill. App. 3d at 364). Here, the defendant challenges the Sex Offender Registration Act, not the Sex Offender and Child Murderer Community Notification Law (see 730 ILCS 152/101 *et seq.* (West 2004)), and the appellate court's latter statement is correct.

as triggers for the Act's registration requirements, the legislature apparently found a link between these offenses and sex offenses against children. The defendant argues that it is not fair for the State to label the aggravated kidnapping of Kimbrough's granddaughter a sex offense, and consequently require him to register under the Act, when his conduct was not sexually motivated. According to the defendant, falsely labeling him as a sex offender is arbitrary and unreasonable; it does not further the Act's purpose of aiding law enforcement and thereby protecting children.

The appellate court here agreed with the defendant, relying on cases from Florida, New York, and Ohio. See 363 Ill. App. 3d at 364 (citing *Robinson,* 873 So. 2d 1205, *People* v. *Wing Dong Moi,* 3 Misc. 3d 1012(A), 2005 NY Slip Op 51068(U) (Westchester County Ct.), and *State* v. *Reine,* 2003-Ohio-50); see also *American Civil Liberties Union of New Mexico* v. *City of Albuquerque,* 2006-NMCA-78, 137 P .3d 1215. The appellate court distinguished *People* v. *Fuller,* 324 Ill. App. 3d 728 (2001), the first Illinois case to handle this issue, because the facts in that case purportedly indicated that the offense was sexually motivated. 363 Ill. App. 3d at 363.

In *Fuller,* the defendant stole a van in which two children were waiting for their father to return from a nearby store. The defendant drove the van for 20 minutes. He talked with, but never touched,

the children. While the van was stopped at a traffic light, the children escaped, and the defendant made no attempt to recapture them. Several hours later, the defendant was arrested. When the police asked him what he planned to do with the children, the defendant stated that he intended " 'to find a hotel room and ask the girl if she had any friends.' " *Fuller,* 324 Ill. App. 3d at 733. The defendant was convicted of aggravated kidnapping, sentenced to six years' imprisonment, and required to register under the Act. He appealed.

The appellate court affirmed, rejecting the defendant's due process challenge to the Act. *Fuller,* 324 Ill. App. 3d at 734. "In essence," noted the court, the defendant "argues nothing more than it is unfair for him to suffer the stigmatization of being labeled a sex offender when his crime was not sexually motivated." *Fuller,* 324 Ill. App. 3d at 733. The court continued:

> "While the term 'sex offender' may carry a stigma, there is little doubt that the offense of kidnaping a person under 18 is intended to trigger the Registration Act. [Citation.] *** It is particularly disingenuous for the defendant to argue that there is no rational relationship between the kidnaping of a child and the purpose of protecting children from the increasing incidence of sexual assault and sexual abuse. The most obvious connection between the offenses listed in section 2(B)(1.5)

> and the purpose of the Registration Act is that kidnaping or unlawful restraint of a minor is often a precursor offense to juvenile pimping or exploitation of a child, which are, indisputably, within the purview of the Registration Act's purpose." *Fuller,* 324 Ill. App. 3d at 733.

As Justice Wolfson stated in his partial dissent, *Fuller* was not "locked into its specific facts." 363 Ill. App. 3d at 364 (Wolfson, J., specially concurring in part and dissenting in part). Instead, the holding in that case was based upon "the logical nexus between the act of kidnaping a child and the very real possibility of subsequent sexual exploitation of that child." *Fuller,* 324 Ill. App. 3d at 734. Since *Fuller* was decided, three Illinois cases have tracked its reasoning and expressly rejected that of the appellate court here. See *People v. Doll,* 371 Ill. App. 3d 1131, 1143 (2007) ("the General Assembly had a rational basis to apply the Registration Act to those convicted of the unlawful restraint of children, because those defendants have a greater propensity to harm a child"); *People v. Beard,* 366 Ill. App. 3d 197, 203 (2006) ("The General Assembly had a rational basis to apply the registration and notification requirements based on its view that kidnappers of children, or those convicted of the unlawful restraint of children, or those who attempt those offenses, may have a propensity to commit sexual crimes against children"); *In re Phillip C.,* 364 Ill. App. 3d 822, 831 (2006) ("the legislature could rationally conclude

that kidnappers of children pose such a threat to sexually assault those children as to warrant their inclusion in the sex offender registry"); see also *People v. Woodard,* 367 Ill. App. 3d 304, 322 (2006) ("We are aware of no authority that would invalidate or call into question the relevant definition of 'sex offense' as the first degree murder of a person under 18, either on its face or as applied").

Fuller, Beard, Phillip C., and *Doll* are consistent with cases from other states holding that similar registration statutes pass constitutional muster. See, *e.g., Gunderson v. Hvass,* 339 F.3d 639 (8th Cir. 2003); *In re T.T.,* 188 N.J. 321, 907 A.2d 416 (2006); *State v. Sakobie,* 165 N.C. App. 447, 598 S.E.2d 615 (2004); *State v. Brown,* 273 Wis. 2d 735, 680 N.W.2d 833 (App. 2004) (table). We find *People v. Cintron,* 2006 NY Slip Op 26301 (Sup. Ct., Bronx County), a recent lower court opinion from New York, particularly well reasoned. *Cintron* involved five unrelated cases in which defendants were convicted of either kidnapping or unlawful imprisonment and required to register under that state's sex offender registration act, though no sexual conduct was alleged. The defendants all claimed the registration act violated due process.

The court first reviewed the so-called Jacob Wetterling Act (JWA) (42 U.S.C. § 14071 (1994)) which originally required states to create sex

offender and crimes against children registries, and later required states to create community notification systems. *Cintron,* 2006 NY Slip Op 26301, *3-4. This statute defined " '[C]riminal offense against a victim who is a minor' " as any offense comparable to kidnapping or false imprisonment by a nonparent. *Cintron,* 2006 NY Slip Op 26301, *3, quoting 42 U.S.C. §§14071(a)(3)(A)(i), (a)(3)(A)(ii) (1994). Congress tied federal funding to compliance with these requirements. *Cintron,* 2006 NY Slip Op 26301, *3. The "JWA and the federal guidelines adopted pursuant to [the] JWA thus mandate that kidnapping and unlawful imprisonment of a minor by a nonparent be included in any state registration program." *Cintron,* 2006 NY Slip Op 26301, *4.

The court stated that New York enacted its registration act to comply with federal law, as well as to assist local law enforcement efforts to protect the public. *Cintron,* 2006 NY Slip Op 26301, *4. That act provided that kidnapping and unlawful imprisonment of a minor by a nonparent were sex offenses, but, as the court noted, "Sexual contact or motivation is not an element of these crimes." *Cintron,* 2006 NY Slip Op 26301, *4. The court further noted that there is no New York appellate court authority addressing the constitutionality of the registration act in this context. *Cintron, 2006* NY Slip Op 26301, *5. The court, however, rejected the decisions of two lower court cases, which held

that these provisions of the registration act violated due process. *Cintron,* 2006 NY Slip Op 26301, *5-7 (discussing *People v. Bell,* 3 Misc. 3d 773, 778 N.Y.S.2d 337 (Sup. Ct., Bronx County), and *Wing Dong Moi,* 3 Misc. 3d 1012(A), 2005 NY Slip Op 51068(U)). According to the court, neither case considered the "JWA's provision that any state program must include kidnapping and unlawful imprisonment of a minor by a nonparent within the sex offenses subject to registration and notification." *Cintron,* 2006 NY Slip Op 26301, *7.

After reviewing the rational basis test, the court concluded that the registration act did not violate due process: "If Congress had a reasonable basis for requiring child abductors to register as sex offenders, it necessarily follows that legislation intended to bring New York into compliance with [the] JWA shares that basis." *Cintron,* 2006 NY Slip Op 26301, *12. The court stated, "The legislative history of [the] JWA reflects that Congress intentionally included kidnapping and unlawful imprisonment of a minor in the crimes subject to registration requirements and was well aware of the connection between child abduction and the risk of sexual abuse." *Cintron,* 2006 NY Slip Op 26301, *10. The court observed that Senator Durenberger, evidently relying on a 1990 Department of Justice study, reported that two-thirds of nonfamily abductions involve sexual assault. *Cintron,* 2006 NY Slip Op 26301, *10, citing 139 Cong. Rec. S6840-02, 86864 (May 28,

1993).

The court further stated that other courts have recognized the link between kidnapping and unlawful imprisonment, and the risk of sexual assault. *Cintron,* 2006 NY Slip Op 26301, *11-12, citing, *inter alia, Fuller,* 324 Ill. App. 3d 728. If the legislature may impose enhanced criminal sanctions on defendants who create a risk of violence-as it does with enhanced sentences for offenses committed with firearms-it certainly may impose noncriminal registration requirements on defendants who create a risk of sexual assault. *Cintron,* 2006 NY Slip Op 26301, *14-15. The court summarized: "[I]t is for the Legislature, not the judiciary, to determine whether making kidnapping and unlawful imprisonment of a minor subject to [the registration act] serves the public interest." *Cintron,* 2006 NY Slip Op 26301, *15.

Though the legislative debates surrounding Public Act 89-8, which added aggravated kidnapping to the Act's definition of sex offense, did not mention the JWA or the 1990 Department of Justice study finding a clear connection between nonfamily abductions and sexual assault, the State asserts in its brief that the JWA "includes nonparental kidnaping crimes against children as requiring registration and established guidelines for states to adopt sexual offender registration and notification laws." The State also directs us to a 2002 Department of Justice study, finding that

nearly half of all nonfamily abductions involve sexual assault. See D. Finkelhor, H. Hammer & A. Sedlak, *Nonfamily Abducted Children: National Estimates and Characteristics,* National Incidence Studies of Missing, Abducted, Runaway, and Thrownaway Children, at 10 (U.S. Department of Justice, October 2002); see also D. Finkelhor & R. Ormrod, *Kidnaping of Juveniles: Patterns from NIBRS,* Office of Juvenile Justice and Delinquency Prevention, Juvenile Justice Bulletin, at 4 (U.S. Department of Justice, June 2000) ("nonfamily kidnaping is generally associated with other offenses, such as robbery or sexual assault, and is in fact a means of facilitating those offenses").

Our General Assembly, like New York's legislature, recognized that aggravated kidnapping can be a precursor to sex offenses against children. The General Assembly then chose to include aggravated kidnapping of a minor by a nonparent in the Act's definition of sex offense and, consequently, to impose a registration requirement under the Act on persons convicted of such an offense, regardless of whether their conduct was sexually motivated. We will not question the wisdom of this choice. To satisfy the rational basis test, a statute need not be the best method of accomplishing a legislative goal; it must simply be reasonable. Here, the legislature had a rational basis for enacting original section 2(B)(1.5), and that statute is not unconstitutional as applied to the defendant.

CONCLUSION

For the reasons that we have stated, the judgment of the appellate court is reversed and this cause is remanded to the trial court.

Reversed;
cause remanded.

JUSTICE BURKE, dissenting:

The court today devotes its opinion to addressing the constitutionality of a statute that no longer exists. This is serious error. Accordingly, I respectfully dissent.

After pleading guilty, defendant, Charles Johnson, was convicted of the armed robbery of 60-year-old Elmora Kimbrough and the aggravated kidnapping of her 20-month-old granddaughter. Defendant was sentenced to concurrent terms of 17 years' imprisonment.

At the time of defendant's convictions, aggravated kidnapping of a minor by a person who was not the minor's parent was defined as a "sex offense" under section 2(B)(1.5) of the Sex Offender Registration Act (730 ILCS 150/2(B)(1.5) (West 2000)). Section 2(B)(1.5) provided:

"(B) As used in this Section, 'sex offense' means:
***

(1.5) A felony violation of any of the following Sections of the Criminal Code of 1961, when the victim is a person under 18 years of age, the defendant is not a parent of the victim, and the offense was committed on or after January 1, 1996:

***

10-2 (aggravated kidnapping)[.]

* * *

An attempt to commit any of these offenses." 730 ILCS 150/2(B)(1.5) (West 2000).

Thus, in addition to the sentences of imprisonment imposed for the criminal offenses, defendant was also required to register as a sex offender.

On appeal, defendant contended that the definition of a sex offense under section 2(B)(1.5) was unconstitutional as applied in this case because the aggravated kidnapping of the granddaughter was not sexually motivated. Defendant maintained there was no evidence of any sexual conduct toward the granddaughter and no indication of any sexual intent. According to defendant, the kidnapping was undertaken solely with a financial motivation, *i.e.,* to collect a ransom. Thus, because the crime was not sexually motivated, defendant contended it was a violation

of due process to classify him as a sex offender.

Addressing defendant's constitutional challenge to the definition of a sex offense as applied in this case, the appellate court first determined that the aggravated kidnapping of the granddaughter was "not sexually motivated and had no sexual purpose." 363 Ill. App. 3d 356, 363.

The court then held that, because defendant's crime was not sexually motivated, defining that crime as a sex offense bore no rational relationship to the state's interest in protecting the public from sex offenders. 363 Ill. App. 3d at 363-64. Thus, the court concluded that section 2(B)(1.5) of the Sex Offender Registration Act was unconstitutional as applied to defendant.

Shortly after the appellate court filed its decision in this case, the General Assembly enacted Public Act 94-945. Effective June 27, 2006, Public Act 94-945 made two significant changes to the registration laws that are relevant to this appeal. First, Public Act 94-945 amended section 2(B)(1.5) of the Sex Offender Registration Act. As amended, section 2(B)(1.5) now defines aggravated kidnapping of a minor as a "sex offense" only if the offense was sexually motivated. Section 2(B)(1.5) currently provides:

"(B) As used in this Article, 'sex offense' means:

***

(1. 5) A violation of any of the following Sections of the Criminal Code of 1961, when the victim is a person under 18 years of age, the defendant is not a parent of the victim, *the offense was sexually motivated as defined in Section 10 of the Sex Offender Management Board Act,* and the offense was committed on or after January 1, 1996:

***

10-2 (aggravated kidnapping)[.]"

(Emphasis added.) Pub. Act 94-945, §1025, eff June 27, 2006 (amending 730 ILCS 150/2(B)(1.5)).

The second significant change made by Public Act 94-945 was the enactment of the Child Murderer and Violent Offender Against Youth Registration Act (Violent Offender Registration Act) (Pub. Act 94-945, eff June 27, 2006 (adding 730 ILCS 154/1 *et seq.)).* The Violent Offender Registration Act creates a new registry for offenders who commit certain violent crimes, including aggravated kidnapping of a child by a nonparent, when those crimes are committed without sexual motivation. Under this new statute, a nonparent who commits aggravated kidnapping of a child without sexual motivation will be required to register as a violent offender. He will

not, however, be a registered sex offender. Moreover, section 11 of the Violent Offender Registration Act authorizes the transfer of the registration information of a person convicted of aggravated kidnapping from the sex offender registry to the violent offender registry, if the crime was not sexually motivated. See Pub. Act 94-945, eff. June 27, 2006 (adding 730 ILCS 154/11).

In light of the changes made to section 2(B)(1.5) of the Sex Offender Registration Act by Public Act 94-945, defendant's challenge to the preamended version of that statute is moot. The rule is well settled. It is a basic tenet of justiciability that reviewing courts will not decide moot or abstract questions or render advisory opinions. *People ex rel. Sklodowski* v. *State,* 162 Ill. 2d 117, 130 (1994), quoting *Barth v. Reagan,* 139 Ill. 2d 399, 419 (1990). An appeal is considered moot where it presents no actual controversy or where the issues involved in the trial court no longer exist because intervening events have rendered it impossible for the reviewing court to grant effectual relief to the complaining party. *In re J. T.,* 221 Ill. 2d 338, 349-50 (2006). In this case, the amended version of section 2(B)(1.5) states that it applies to those defendants convicted of aggravated kidnapping of a minor when "the offense was committed on or after January 1, 1996." Pub. Act 94-945, §1025, eff. June 27, 2006 (amending 730 ILCS 150/2(B)(1.5)). The amended statute thus includes defendant, who committed the aggravated kidnapping at issue in

this case in 1999. Further, since the preamended version of section 2(B)(1.5) also covered only those offenses committed on or after January 1, 1996, there are no persons who remain subject to the original statute. The amended section 2(B)(1.5) supersedes the original statute in its entirety.

Because the new version of section 2(B)(1.5) has superseded the old, there is no "actual controversy" regarding the constitutionality of the preamended statute as it applies to defendant. As this court has held, "in those cases where, during the pendency of the case, an amendment remove[s] or alter[s] the potentially unconstitutional language or aspect of a challenged statute, *** the constitutional challenge to the statute is moot." *Johnson v. Edgar,* 176 Ill. 2d 499, 511 (1997); see also *Forest Preserve District v. City of Aurora,* 151 Ill. 2d 90, 94 (1992) (" 'where a challenged statute is amended while the cause is pending, the question of the statute's validity becomes moot, thus rendering unnecessary its review by the court' "), quoting *People v. B.D.A.,* 102 Ill. 2d 229, 233 (1984); *Arrington v. City of Chicago,* 45 Ill. 2d 316 (1970). The amendment to section 2(B)(1.5) eliminated that aspect of the statute which defendant challenged as being unconstitutional as applied to him, *i. e.,* the unqualified definition of aggravated kidnapping of a minor as a sexual offense. Accordingly, the constitutionality of the preamended version of section 2(B)(1. 5) as applied to defendant is a moot question.

Nevertheless, without citation to any authority which would call into question these settled principles, the court addresses the constitutionality of the superseded version of section 2(B)(1. 5) as it applies to defendant. In order to justify its actions, the court does not look to the definition of "sex offense" in either the old or new version of section 2(B)(1. 5), but, instead, focuses on the transfer provision found in section 11 of the Violent Offender Registration Act. Slip op. at 5-8.

As the court notes, nothing in section 11 authorizes an offender to go before a court of law to seek transfer from the sex offender registry to the violent offender registry. Slip op. at 7. Rather, an offender who wants to ensure that he or she is transferred off the sex offender registry to the violent offender registry will have to contact the "State's Attorney's Office in the county in which the offender was convicted" and request that the office verify, "on a form prescribed by the Illinois State Police," that the crime was not sexually motivated. Pub. Act 94-945, eff. June 27, 2006 (adding 730 ILCS 154/11(a)(2)). Transfer cannot occur until the registering law enforcement agency, and the Illinois State Police (the department that maintains the sex offender registry), have received the completed form. Pub. Act 94-945, eff. June 27, 2006 (adding 730 ILCS 154/11(a)(3)). Further, according to the court, section 11 "does not contemplate judicial review of a decision by the

State's Attorney that the offense was sexually motivated, and consequently that the person is ineligible for a transfer." Slip op. at 7.

With this understanding of section 11, the court presumes, based on arguments made in this appeal, that the State's Attorney of Cook County (the county in which defendant was convicted) will decide that defendant's crime is sexually motivated. Slip op. at 8. This decision, the court states, "exemplifies the problem with the statutory scheme" (slip op. at 7), because, now, defendant has "no way off" the sex offender registry (slip op. at 8). From this, the court then concludes, without offering any further explanation, that "[t]he constitutionality of original section 2(B)(1. 5)" is "squarely before us." Slip op. at 8.

There are several problems with the court's justification for addressing the merits of defendant's challenge to the original section 2(B)(1.5). First, the State's Attorney of Cook County, although of counsel to the State in this appeal, has not made any representations to this court as to how defendant's crime will be treated under section 11 of the Violent Offender Registration Act. It is inappropriate for "a reviewing court to make fact determinations" (slip op. at 7), particularly when those determinations require predicting the future.

Further, it is unclear why the court believes it

is a "problem" for defendant to remain on the sex offender registry when the State's Attorney has concluded that his crime was sexually motivated. Does the court mean to say that it disagrees with the State's Attorney's decision regarding sexual motivation in this particular case and the "problem" is that the court has no way to review that decision? Or does the court mean to say that the "problem" with section 11 of the Violent Offender Registration Act is that it gives a State's Attorney the authority to make the decision, in every case, regarding sexual motivation? Or does the court mean something else? The court never says.

The fundamental difficulty with the court's reasoning, however, is that there is no connection between finding a "problem" with section 11, the *transfer* provision of the Violent Offender Registration Act, and reviving the old section 2(B)(1.5), the *definition* provision of the Sex Offender Registration Act. Regardless of what "problem" exists with section 11-whether it is the inability to review a State's Attorney's decision regarding sexual motivation, the granting of the authority to a State's Attorney to make that decision in the first place, or something else-the old version of section 2(B)(1. 5) is *no longer in effect.*

The only way for the court to revive the old version of section 2(B)(1.5) would be to hold the new version of that section void, thus leaving in

place the law that previously existed. See, *e.g.*, *Harshman* v. *DePhillips,* 218 Ill. 2d 482, 489 n.l (2006). The court does not do this. Instead, the court looks to section 11 of the Violent Offender Registration Act, determines that defendant has "no way off" the sex offender registry, and concludes that this "problem" revives the old section 2(B)(1.5) of the Sex Offender Registration Act. But any problem with transfer under section 11 of the Violent Offender Registration Act is just that-a problem with section 11, not section 2(B)(1.5) of the Sex Offender Registration Act. The new definition of "sex offense" found in the amended version of section 2(B)(1.5) remains unchanged and in effect. The preamended version of section 2(B)(1.5)-the statute that was addressed by the appellate court below-no longer exists. Perhaps, as the court seems to suggest, defendant has some legal claim to bring against section 11 of the Violent Offender Registration Act. However, his claim that the preamended version of section 2(B)(1. 5) is unconstitutional as applied to him is plainly moot.

Finally, any question as to whether the court has erred in reaching defendant's constitutional argument is answered by considering the fundamental structure of the court's analysis. On the one hand, the court expressly holds that the amended version of section 2(B)(1. 5) has superseded the previous version of the statute and that the new section 2(B)(1. 5) applies to this case.

Slip op. at 5. On the other hand, the court expressly holds that the previous version of section 2(B)(1.5) is "squarely before us." Slip op. at 8. In other words, the court is holding-quite literally-that both statutes are in effect at the same time. This cannot be correct.

This court should adhere to the straightforward rule set forth in our case law: "'where a challenged statute is amended while the cause is pending, the question of the statute's validity becomes moot, thus rendering unnecessary its review by the court.'" *Forest Preserve District v. City of Aurora,* 151 Ill.. 2d 90, 94 (1992), quoting *People v. B.D.A.,* 102 Ill. 2d 229, 233 (1984). In accordance with this established precedent, this court should hold that it is a moot question whether the preamended version of section 2(B)(1.5) is unconstitutional as applied to defendant. The court should then vacate that portion of the appellate court's judgment that addressed the constitutionality of the preamended version of section 2(B)(1.5). See *Forest Preserve District,* 151 Ill. 2d at 94; *B.D.A.,* 102 Ill. 2d at 234. Questions regarding the interpretation and legality of section 11 should be left to another day, when those questions are squarely before us.

I disagree with the court's decision to reach the merits of defendant's constitutional claim. However, even if I were to agree that it is appropriate to address that claim, for the following reasons I cannot join the court's opinion.

The judgment of the appellate court below was that the preamended section 2(B)(1.5) was unconstitutional *as applied* to defendant. It is this decision which the State appealed (see slip op. at 1), and which the court asserts is "squarely before us" (slip op. at 8). The court reverses the appellate court's judgment, holding: "Here, the legislature had a rational basis for enacting original section 2(B)(1. 5), and that statute is not unconstitutional *as applied* to the defendant." (Emphasis added.) Slip op. at 15. The court cannot reach this conclusion on the record before us.

As we have previously explained:

> "A court is not capable of making an 'as applied' determination of unconstitutionality when there has been no evidentiary hearing and no findings of fact. *Reno* v. *Flores,* 507 U.S. at 300-01, 123 L. Ed. 2d at 15-16, 113 S. Ct. at 1446 (when there are no findings or evidentiary record, the constitutional challenge must be facial). Without an evidentiary record, any finding that a statute is unconstitutional 'as applied' is premature. *See In re R.C.,* 195 Ill. 2d 291, 299-300 (2001); see also *Desnick* v. *Department of Professional Regulation,* 171 Ill. 2d 510, 555-56 (1996) (McMorrow, dissenting) (reaching the merits of a constitutional 'as applied' challenge without the presentment or circuit court consideration of any evidence

> creates constitutional due process concerns). Nor would it be appropriate for this court, *sua sponte,* to consider whether [a] statute has been constitutionally applied since we, as a reviewing court, are not arbiters of the facts." *In re Parentage of John M.,* 212 Ill. 2d 253, 268 (2004).

In this case, the court notes that the circuit court made no findings regarding the sexual motivation of defendant's crime. Slip op. at 7. In addition, the court vacates the appellate court's determination that defendant's crime was not sexually motivated. Slip op. at 7. Thus, as this case presently stands, there are no judicial findings of fact with respect to whether defendant's crime was sexually motivated. It is error, therefore, for the court to make an as-applied determination regarding the constitutionality of the preamended section 2(B)(1.5).

For the foregoing reasons, I respectfully dissent.

JUSTICES FREEMAN and KILBRIDE join in this dissent.